United Nations A/CN.9/WG.V/WP.130

General Assembly

Distr.: Limited
12 March 2015

Original: English

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Forty-seventh session
New York, 26-29 May 2015

Insolvency Law

Cross-border recognition and enforcement of insolvency-related judgements

Note by the Secretariat

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgements.

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgements, including the types of judgements that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),[1] but that the Model Law provided an appropriate context for the new instrument.

3. The draft text set forth below is drafted in the form of a model law to be given effect through enactment by a State and thus, when it refers to "this State", it means the enacting State. The content and structure of the draft text draws upon the Model Law, as suggested by the Working Group (A/CN.9/829, para. 63). References to the relevant Model Law sources of certain definitions and articles are indicated in the footnotes (e.g. draft articles 8 and 9 follow elements of articles 15, 16 and 17 of the Model Law).

[1] A/CN.9/829, paras. 60 and 74.

V.15-01725 (E)

Please recycle

4. The draft text seeks to give effect to the conclusions of the Working Group at its forty-sixth session, particularly with respect to the types of judgement to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

5. One issue not considered in the draft is the treatment of judgements arising in what might be considered competing insolvency proceedings (A/CN.9/829, para. 75). This issue might be relevant in the types of scenario outlined in working paper A/CN.9/WG.V/WP.128 concerning cross-border treatment of the insolvency of enterprise groups, which is also to be discussed at the Working Group's forty-seventh session.

Draft model law on the recognition and enforcement of insolvency-related judgements

Preamble

The purpose of this Law is to provide for recognition and enforcement of insolvency-related judgements in cross-border insolvency cases in a predictable and transparent manner, in order to promote:

(a) Cooperation between the courts of this State and courts of other States involved in cross-border insolvency cases;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvency cases;

(d) Protection and maximization of the value of the debtor's assets and affairs, and distributions to creditors; and

(e) Simplification of the procedure and reduction in the cost and time required for recognition and enforcement of insolvency-related judgements.

Article 1. Scope of application

1. This Law applies where:

(a) Recognition and enforcement of an insolvency-related judgement is sought in this State by a foreign representative or other person entitled to seek enforcement of such a judgement in connection with a foreign proceeding; or

(b) Recognition and enforcement of an insolvency-related judgement is sought in a foreign State in connection with a proceeding under the law of this State.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in which the assets and affairs of a debtor are [or were] subject to control or supervision by the court for the purpose of reorganization or liquidation;[2]

(b) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;[3]

(c) "Judgement" means any judicial or administrative decision, whatever it may be called, including a decree or order, and a determination of costs and

[2] This definition is based on the Model Law, art. 2, subpara. (a).

[3] Ibid., art. 2, subpara. (d).

expenses provided that the determination related to a judicial or administrative decision,[4] and any decision ordering provisional or protective measures;[5]

(d) "Insolvency-related judgement" means a judgement that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgement is presumed to be "closely related to a foreign proceeding" if it has an effect upon the insolvency estate of the debtor and either: (i) is based on a law relating to insolvency; or (ii) due to the nature and legal basis of its underlying claims, would not have been issued without the commencement of the foreign proceeding.[6] An insolvency-related judgement would include any equitable relief, including the establishment of a constructive trust, provided in that judgement or required for its enforcement. Insolvency-related judgements may include judgements concerning any of the following matters:

(i) Turnover of property of the insolvency estate;

(ii) Sums due to the insolvency estate;

(iii) Sale of assets by the insolvency estate;

(iv) Requirements for accounting related to the insolvency proceeding;

(v) *Variant 1*

Overturn of transactions involving the debtor or assets of the insolvency estate that have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;[7]

(v) *Variant 2*

Resolution of actions to avoid or otherwise render acts detrimental to creditors ineffective,[8] including undervalued transactions, preferential transactions and transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;[9]

(vi) Modification or enforcement of a stay of actions in a foreign proceeding;[10]

(vii) Validity of a secured claim;

---

[4] This definition is taken from the Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), art. 4.

[5] This last phrase relating to provisional measures is taken from the draft global judgements convention prepared by The Hague Conference on Private International Law, 2001 version, art. 23.

[6] The draft article might indicate that for the purposes of this model law, an insolvency-related judgement would not include a judgement imposing a criminal penalty.

[7] The wording of this variant is based on the UNCITRAL Legislative Guide on Insolvency Law, rec. 87.

[8] The wording of this variant is based on the UNCITRAL Model Law on Cross-Border Insolvency, art. 23.

[9] This wording is taken from the Legislative Guide, rec. 87.

[10] Some consideration might be given to the issue of possible overlap with provisions of the Model Law, such as art. 22, para. 3.

(viii) A cause of action pursued by a creditor with approval of the court, based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action;

(ix) Liability of a director in the period approaching insolvency;[11]

(x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement];

(xi) Whether a particular debt can be discharged; and

(xii) Recognition of the discharge of a debtor.

Article 3. International obligations of this State[12]

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. Competent court or authority[13]

The functions referred to in this Law relating to recognition and enforcement of insolvency-related judgements shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State[14]

A party entitled to enforce an insolvency-related judgement given under the law of this State is authorized to act in a foreign State to seek enforcement of that judgement, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws[15]

Nothing in this Law limits the power of a court or a [*insert the title of any other person or body administering the recognition and enforcement of an insolvency-related judgement under the law of the enacting State*] to provide to a party seeking recognition and enforcement of an insolvency-related judgement in this State additional assistance or relief under other laws of this State, in particular those laws relating to decisions concerning the commencement, conduct, administration and conclusion of insolvency proceedings.

Article 7. Interpretation[16]

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

---

[11] See Legislative Guide, part four dealing with the obligations of directors of a company in the period approaching insolvency, recs. 255, 259 and 260.

[12] This draft article repeats art. 3 of the Model Law.

[13] Ibid., art. 4, with revisions specific to insolvency-related judgements.

[14] Ibid., art. 5.

[15] Ibid., art. 7.

[16] Ibid., art. 8.

Article 8. Recognition and enforcement of an insolvency-related judgement[17]

1. A foreign representative or other person entitled under the law of the State in which the judgement was issued to seek enforcement of an insolvency-related judgement may request the court in this State to recognize and enforce that judgement.[18]

2. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:

(a) A copy of the insolvency-related judgement;

(b) A certified statement of whether the insolvency-related judgement is a final judgement or, if not, the identification of the appellate court where any appeal is pending, and the status of the appeal;

(c) Evidence that the party against whom relief is sought received notice of the proceeding in which the insolvency-related judgement was issued and had an opportunity to be heard prior to the issue of the judgement; and

(d) Evidence that the party against whom relief is sought was provided notice of the request in this State for recognition and enforcement of the insolvency-related judgement.

3. The court may require translation of documents supplied in support of recognition of the insolvency-related judgement into an official language of this State.

4. The court is entitled to presume that documents submitted in support of a request for recognition of the insolvency-related judgement are authentic, whether or not they have been legalized.

Article 9. Decision to recognize and enforce an insolvency-related judgement[19]

An insolvency-related judgement shall be recognized and may, upon recognition, be enforced without review of the merits of the judgement provided:

(a) The insolvency-related judgement is within the meaning of article 2, subparagraph (c);

(b) The person seeking enforcement of the insolvency-related judgement is a person within the meaning of article 2, subparagraph (b), or another person entitled to seek enforcement of the judgement under article 8, paragraph 1;

(c) The requirements of article 8, paragraph 2, are met;

(d) The court from which recognition is sought is the court referred to in article 4; and

(e) Article 10 does not apply.

---

[17] This draft article is based on art. 15 of the Model Law, paras. 1, 2 and 4. Draft para. 4 of this article is based on art. 16, para. 2, of the Model Law.

[18] An insolvency-related judgement may also be raised as a defence to an action concerning the same matter/claim in the enacting or another State.

[19] This draft article is based on art. 17 of the Model Law.

Article 10. Grounds to refuse recognition of an insolvency-related judgement[20]

The court may decline to recognize an insolvency-related judgement if the party against whom relief is sought demonstrates that:

(a) The insolvency-related judgement is subject to review in the originating State or the time limit for seeking review has not expired and the originating State would not enforce the insolvency-related judgement because of the availability of such review;

(b) The party against whom the proceeding giving rise to the insolvency-related judgement was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(c) The insolvency-related judgement was obtained by fraud in connection with a matter of procedure;

(d) Recognition and enforcement of the insolvency-related judgement would be manifestly contrary to the public policy of this State;

(e) The proceeding in which the insolvency-related judgement was issued was manifestly contrary to the fundamental principles of procedural fairness of this State;

(f) The insolvency-related judgement is inconsistent with a prior judgement given in this State in a dispute between the same parties;

(g) The insolvency-related judgement is inconsistent with an earlier judgement given in another State involving the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in this State;

(h) Recognition and enforcement of the insolvency-related judgement would interfere with the administration of the debtor's insolvency proceedings[21] or would be inconsistent with a stay or other order entered in insolvency proceedings in this or another State;

(i) *Variant 1*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on a basis that was unreasonable or unfair. A basis of jurisdiction is not

[20] These grounds are based upon those discussed and agreed upon at the Working Group's forty-sixth session (A/CN.9/829, paras. 68-71).

[21] At the forty-sixth session, it was suggested that this ground might be included as an alternative to restricting recognition to judgements emanating from proceedings that might be regarded as main or non-main proceedings (A/CN.9/829, para. 70).

unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State.

(i) *Variant 2*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on
one of the following grounds:

(i) The presence of that party's property in the jurisdiction of the foreign court, when the property is unrelated to the insolvency-related judgement;

(ii) The nationality of a different party; or

(iii) Any other basis that was unreasonable or unfair; a basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State.

Article 11. Severability[22]

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognized or enforced under this Law.

Article 12. Provisional relief[23]

1. From the time recognition and enforcement of an insolvency-related judgement is sought until a decision is made, the court may grant relief of a provisional nature where relief is urgently needed, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgement has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgement.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgement is made.

---

[22] At its forty-sixth session, the Working Group noted that it might be advisable to provide for severability so as to enable enforcement of only a part of a judgement in cases where grounds for refusal of other parts might exist, certain elements such as a punitive damages award might thus be excluded (A/CN.9/829, para. 61). This draft article is based on article 15 of the 2005 Hague Convention (see note 4).

[23] This draft article is based upon paras. 1, 2 and 3 of art. 19 of the Model Law; para. 4 of article 19 is included among the grounds for refusal of recognition under draft art. 10, subpara. (h).